

The Commission considers competing sports networks to be similarly situated if, based on ratings reported by Nielsen Media Research (“Nielsen”), the independent network is “at least as popular than the sports programming distributed by [the affiliated network], and thus [at least] comparable in terms of demand.”⁷⁰ As the networks’ ratings reflect, the NFL Network is consistently *more* popular than Versus and the Golf Channel, both with respect to overall ratings and with respect to each network’s most popular individual programs.⁷¹

Although its expert concedes that these networks compete in at least some respects,⁷² Comcast incorrectly contends that the NFL Network cannot be similarly situated with Versus and the Golf Channel because the three channels carry varying mixes of different kinds of sports programming, do not have identical programming schedules, and therefore are not “equivalent.”⁷³ This contention reflects a fundamental misunderstanding of the governing law.

As the Media Bureau observed, a network need not “demonstrate that its programming is identical to an affiliated network in order to demonstrate discrimination.”⁷⁴ To require such a showing would mean that no independent programmer could ever satisfy its burden of demonstrating a Section 76.1301(c) violation, since every programming service invariably differs in some respects from its competitors. The relevant consideration under Section 76.1301(c) is not whether the complaining unaffiliated channel is “identical” or “equivalent” to any particular service affiliated with the defendant, but instead whether the

⁷⁰ TCR ¶ 29 & n.109.

⁷¹ Singer Report ¶¶ 26-30 & Tables 2-6.

⁷² Deposition of Jonathan Orszag 174:21-176:2 (April 1, 2009) [hereinafter Orszag Dep.].

⁷³ See Comcast Answer to NFL ¶¶ 58, 69; Declaration of Jonathan Orszag and Jay Ezrielev, ¶ 38 (Exhibit 8 to Comcast Answer) (June 19, 2008) (Enterprises Exh. 141); Declaration of Jeff Shell ¶ 9 (Exhibit 9 to Comcast Answer) (June 19, 2008) (Enterprises Exh. 140).

⁷⁴ HDO ¶ 75.

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unaffiliated network, here the NFL Network, competes against the affiliated networks, here Versus and the Golf Channel, such that disadvantaging the unaffiliated network could benefit the affiliated networks.⁷⁵

The Media Bureau's recent decisions make clear that this is the governing standard for determining "similarly situated" networks. For example, the Bureau found *prima facie* evidence that Comcast had discriminated in favor of its regional multisport network, Comcast SportsNet Mid-Atlantic, by discriminating against the Mid-Atlantic Sports Network ("MASN"), a single-sport channel focused at the time on the home baseball teams of two cities, Baltimore, Maryland, and Washington, D.C.⁷⁶ Similarly, the Bureau upheld an arbitrator's program carriage decision under its *Adelphia Order* that found that Time Warner had discriminated against MASN by carrying on more favorable terms News 14 Carolina, a local news channel that happened to carry some local basketball programming.⁷⁷

Despite Comcast's assertions to the contrary in its pleadings before the Commission, '

⁷⁵ *See id.*

⁷⁶ *TCR Sports Broadcasting Holding, L.L.P. v. Comcast Corporation*, Mem. Op. & Hearing Designation Order, 21 FCC Rcd 8989 (2006) (Enterprises Exh. 182).

⁷⁷ *TCR* ¶¶ 27-29.

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Indeed, the fact that Versus and the NFL Network have competed for programming indicates that, by definition, the two channels are competitors and therefore similarly situated.

Although distinctions between any two channels always can be found, in the case of Versus, the Golf Channel, and the NFL Network, they are not material. Because the NFL Network and Comcast's affiliated national sports networks compete for viewers, advertisers, and programming, the three networks are similarly situated under Section 616.

B. Comcast Treats Its Affiliated Networks More Favorably Than the NFL Network.

It is beyond dispute that Comcast has treated its own networks, Versus and the Golf Channel (as well as the MLB Network, in which Comcast owns a minority share), more favorably than the independent NFL Network. Under the Commission's precedent, carriage of two networks on different programming tiers qualifies as differential treatment. For example, the Media Bureau held that Time Warner had discriminated against MASN by carrying its affiliated channels on an analog expanded basic tier but agreeing to carry MASN only on a digital basic tier.⁸⁰

The facts in this case are far more stark. Comcast *moved* the NFL Network to a *premium* sports tier but continues to carry Versus and the Golf Channel on analog expanded basic.⁸¹ It did so, and continues to do so, despite the fact that the NFL Network is far more popular than either Versus or the Golf Channel. As a result, Versus and Golf are received by 20

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⁸⁰ TCR ¶¶ 29.

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million Comcast subscribers — ten times the number that the NFL Network reaches on Comcast's sports tier.⁸²

Comcast treats Versus and the Golf Channel more favorably in other ways.

In an even more recent demonstration of favorable treatment for its affiliated networks, Comcast granted broad carriage to the newly launched MLB Network following Comcast's acquisition of an equity interest in the channel.⁸⁷

C. Comcast's Discrimination Unreasonably Restrained the NFL Network from Competing Fairly.

moving a network to a premium sports tier reduces the channel's advertising revenue, licensing revenue, and ability to secure desirable

⁸² Singer Testimony Table 16.

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⁸⁷ Singer Testimony ¶ 46 n.19;

content. In turn, those reductions restrain the network from competing.⁸⁸ Enterprises has experienced all of these harms as a result of Comcast's differential treatment. Because Comcast's tiering has "restrained [NFL Enterprises'] ability to compete fairly for viewers, advertisers, and sports programming rights,"⁸⁹ Comcast has discriminated against the NFL Network in violation of Section 616 and the Commission's rules, and it also has harmed consumers.

Comcast's discrimination has, predictably, deprived Enterprises of significant licensing fees. The NFL Network has lost millions each month in licensing revenues because of Comcast's tiering.⁹⁰ Moreover, the tiering has increased Enterprises' costs; because of the lower distribution, Enterprises was compelled to spend more money on marketing than it would otherwise have been required to spend.⁹¹ This, in turn, has exerted upward pressure on the MVPD licensing fees that Enterprises must charge.⁹² In addition, Comcast's tiering may also have caused a "chain reaction in the industry," influencing other MVPDs to withhold broad carriage from the NFL Network.⁹³

Comcast's discrimination also has harmed the NFL Network's ability to secure advertising revenues. Advertisers that seek to purchase time on "national" networks commonly view \$50 million as the minimum number of subscribers to compete for "national" advertising

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⁸⁹ *TCR* ¶ 31.

⁹⁰ *Singer Report* ¶ 48.

⁹¹ *Hawkins Testimony* ¶ 27.

⁹² *Id.* ¶¶ 55-56.

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contracts.⁹⁴ As networks fall more and more short of this level, it becomes more and more difficult for them to secure advertising. If the NFL Network were carried on the same terms as Versus and the Golf Channel, it would have at least 50 million subscribers;⁹⁵ as a result of Comcast's discriminatory treatment, its subscribers are far fewer. Consequently, several NFL Network advertisers — such as — have cut NFL Network advertising or eliminated it entirely, identifying limited distribution (caused by Comcast's tiering) as the reason for their decisions.⁹⁶

Comcast's tiering of the NFL Network also has hurt its ability to compete for telecast rights.

For example, the NFL Network's bid for a package of Pac-10 and Big 12 Conference college football games was ultimately unsuccessful because the NFL Network did not reach a sufficient number of households.⁹⁸ This restriction on the NFL Network's ability to compete for programming directly benefited Comcast's affiliate Versus, a competing bidder for these games; indeed, the games are now telecast on Versus.⁹⁹

These harms have adversely impacted advertisers and viewers as well as the NFL Network. Carriage of the NFL Network on a sports tier hurts viewers because it forces them to

⁹⁴ Furman Testimony ¶ 16.

⁹⁵ Hawkins Testimony ¶ 30.

⁹⁶ Furman Testimony ¶¶ 18-19; Hawkins Testimony ¶ 33.

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⁹⁸ Hawkins Testimony ¶ 31.

⁹⁹ *Id.*

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pay high subscription fees — as much as \$84 annually¹⁰⁰ — in order to receive the NFL Network. Given this high price, many viewers who value the NFL Network may stop or forgo receiving it.

The tiering of the NFL Network also has hurt advertisers. Comcast's wrongful discrimination removed from broad penetration a channel attracting the desirable 18-to-49 male demographic into which football fans fall, forcing the advertisers to choose less highly rated networks like Versus instead. In addition, because Comcast's tiering of the NFL Network has made the Network less competitive, the NFL Network is unable to compete effectively for advertisers with sports networks such as the Golf Channel and Versus. These effects represent the precise evils that Section 616 was enacted to prevent. They diminish competition and drive down the number of media voices available to consumers.

Comcast's contrary argument amounts to a claim that Section 616 requires a complainant to show that, because of the discrimination, it "cannot compete at all, *i.e.*, would exit the industry, operate at a loss, or suffer some similar major disadvantage."¹⁰¹ Comcast's failure to drive the NFL Network from the market cannot excuse its discriminatory conduct. The Bureau found no support in Section 616 or its legislative history for "such a restrictive interpretation."¹⁰² Instead, the governing test is whether the discrimination "restrained [the programmer's] ability to compete fairly for viewers, advertisers, and sports programming rights" — a standard Comcast's discrimination plainly meets.

¹⁰⁰ Comcast, "See Prices and Choose Packages," www.comcast.com (Enterprises Exh. 176).

¹⁰¹ *TCR* ¶ 30.

¹⁰² *Id.*

D. Comcast's Purported Business Justifications Are Pretextual.

In its pleadings, Comcast offered two main reasons for providing the NFL Network with much worse carriage than it provides Versus and the Golf Channel: the NFL Network's supposedly "niche" appeal and its putative overpricing. Neither of these claims has any merit. Perhaps in recognition of that fact, Comcast's experts now have shifted ground and cited a number of additional explanations said to justify Comcast's discrimination of NFL Network. These claims are all groundless.

1. The NFL Network's Alleged "Unpopularity"

In an effort to justify its discriminatory conduct, Comcast falsely claims that the NFL Network's programming is unpopular. In fact, the NFL Network's programming is more highly rated than programming on Versus or Golf Channel throughout the year.¹⁰⁴ This is because, as a general matter, football is far more popular than golf, hockey, cagefighting, cycling, and bull riding, the sports on which Versus and the Golf Channel focus.¹⁰⁵ For example, if the Golf Channel's most popular program between January 1, 2003 and December 31, 2008 had been carried on the NFL Network, it would have been only the 44th most highly rated

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¹⁰⁴ Singer Report Tables 2, 3.

¹⁰⁵ Singer Report ¶ 45; Orszag Report ¶ 15; Hawkins Testimony ¶ 16.

program. Similarly, Versus' most popular program during that period would have been ranked 35th on the NFL Network.¹⁰⁶

Comcast's experts have suggested that these ratings do not matter in carriage decisions.¹⁰⁷ This suggestion is inconsistent with common sense and the reality of the industry

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Moreover, Comcast's own actions have belied its contention that the NFL Network is unpopular.

¹⁰⁶ Hawkins Testimony ¶ 16.

¹⁰⁷ See Orszag Report ¶ 33; Report of Larry Gerbrandt ¶¶ 29-32 (Mar. 13, 2009) [hereinafter Gerbrandt Report]. These experts instead try to supplant ratings with factors that they either have not analyzed (like carriage terms) or that cannot be analyzed because they are so amorphous.

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In addition,

Comcast's claim that the NFL Network is too unpopular for broad carriage also is contradicted squarely by Comcast's willingness to offer broad carriage to affiliated channels of

¹¹⁰ Hawkins Testimony ¶ 19;

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far less popularity. For instance, Comcast recently granted wide distribution to the newly launched MLB Network after receiving an equity stake in that channel.¹¹⁴

2. *The NFL Network's Purportedly "Excessive" Cost*

Comcast asserts that its discriminatory conduct is justified because the NFL Network seeks a price above the "correct" price for carriage on a broadly distributed tier.¹¹⁵ But that view is directly at odds with objective market evidence. Analyses of the NFL Network's existing carriage agreements indicate that \$1.00 per subscriber per month is the 2008 fair market value for Comcast's carriage of the NFL Network.¹¹⁶ And the vast majority of the NFL Network's distributors carry the channel at market rates on broadly penetrated tiers.¹¹⁷

Comcast's objection to the rate also is inconsistent with the fact that Comcast had the option, but not the obligation, to carry the NFL Network with the eight-game package and pay a surcharge for this additional content. If, as Comcast now claims, the eight-game package was worthless, it could have continued carrying the channel without the eight-game package and at the same rate at which it had already chosen to carry the channel for two years on the D2 tier. But Comcast did value the eight-game package — as its decision to make

reflects — and it chose to accept the surcharge for the games because, like its competing MVPDs, it determined that they were fairly priced.

¹¹⁴ Singer Testimony ¶ 46 n.19

¹¹⁵ Comcast Answer ¶ 53.

¹¹⁶ Enterprises' expert concludes that the proper rate is \$1.00. Singer Report ¶ 73.

¹¹⁷ *Id.* ¶ 31.

Comcast has refused to take a position in this litigation as to what it believes the correct price for broad carriage of the NFL Network to be.¹¹⁸ But Comcast

Comcast also self-servingly argues that it does not carry the NFL Network on a broadly distributed tier because it does not want to pass through the Network's cost to its subscribers.¹²⁰ This assertion cannot be reconciled with the fact that, when it removed the NFL Network from its basic digital tier after carrying it there with the eight-game package for nearly a year, Comcast failed to pass on its purported cost savings to its subscribers. No Comcast

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¹²⁰ Comcast Answer ¶ 54.

customer's bill went up with the addition of the eight-game package or down with the tiering of the NFL Network.

Tellingly, Comcast's experts have been unable to determine any actual or hypothetical fee increase that Comcast would impose for non-discriminatory carriage, or any negative impact that non-discriminatory carriage would have on Comcast's healthy profits.

3. *Sunday Ticket Does Not Make the NFL Network Less Valuable to Comcast*

The NFL Network offers in-depth "Football 24/7" coverage 365 days a year. Its programming includes live and tape-delayed pre-season and regular season NFL games throughout the year, comprehensive coverage of football news throughout the year, and focused coverage of the NFL Scouting Combine, the NFL Draft, training camps, personnel changes, and other football-oriented programming. Comcast chose to purchase this programming and carry it at broad penetration for two years before the Network even had the eight-game package, and this programming (even without the eight games) regularly meets or exceeds the performance of channels like Versus and the Golf Channel.

Nonetheless, Comcast now argues that the NFL Network neither brought subscribers to nor retained subscribers for Comcast because any viewers with an interest in professional football subscribed instead to DIRECTV's Sunday Ticket, a limited package of out-of-market games shown only on Sunday afternoons and only during the regular season.¹²² The facts fail to support this contention, which is not credible on its face, given the cost of Sunday

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¹²² Comcast Answer ¶ 53.

Ticket, the cost of converting to DIRECTV, and the appeal of other products with which Comcast bundles its digital basic service.

The fundamental flaw in Comcast's argument is that it washes away a large number of fans who do not wish to pay \$280 for Sunday Ticket, cannot receive DIRECTV for topographical or other reasons, prefer Comcast's bundled video-on-demand, telephone, and broadband services, or whose interest in football is enthusiastic but not so rabid as to warrant a Sunday Ticket subscription. This audience base alone is sufficient to justify Comcast's carriage of the NFL Network. Comcast, of course, understood this, because otherwise it would not have bid so aggressively to acquire the eight-game package for Versus.

4. *Other MVPDs' Carriage of the NFL Network*

Comcast argues that because the NFL Network is not carried broadly by certain cable operators, the Network must be unpopular.¹²⁵ In their carriage decisions, MVPDs try to

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¹²⁵ See, e.g., Orszag Report ¶ 10.

predict program popularity. But their decisions are mere predictions. The reality is demonstrated by ratings. And the ratings show that the NFL Network is far more popular than Versus and the Golf Channel; indeed, almost twice as popular based on prime-time ratings.¹²⁶ The fact that some large cable MVPDs do not carry the NFL Network does not undercut the conclusive evidence provided by Nielsen ratings.

Notably:

- Over 200 MVPDs carry the NFL Network.
- Comcast's direct competitors (Verizon, AT&T and DirecTV) do carry the NFL Network.¹²⁷
- Comcast itself predicted that its tiering would hurt the NFL Network in the broader marketplace. It may not now cite this precise effect to justify its tiering.
- At least two of those other large cable operators are also vertically integrated and may well be discriminating against the NFL Network in favor of their own program channels. In fact, their decisions may not be the product of independent decisionmaking. Comcast frequently engages in joint ventures with Time Warner (the largest of the non-carriers), and senior Comcast executives admitted that :

Given that the ratings conclusively demonstrate the popularity of the NFL Network, it is clear that what has motivated Comcast's otherwise irrational decision to relegate the NFL Network to an expensive and sparsely penetrated tier is its desire to hurt a competitor of

¹²⁶ Hawkins Testimony ¶ 13; Singer Testimony Table 3.

¹²⁷ Comcast makes its program carriage decisions with reference to its competitors, not with reference to other cable operators with whom it does not compete. See, e.g.,

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its own rival programming channels, so that Comcast may eventually acquire its program content at below-market prices — conduct squarely prohibited by Congress.

5. *The Enterprises-Comcast Contract*

Comcast claims that it is immunized from Section 616 claims because, in its view, its contract with Enterprises allows it to tier the NFL Network.¹²⁹ But Comcast cannot use its contract with the NFL Network to shield itself from governing federal law. Enterprises disputes Comcast's interpretation of the contract, an issue before the New York state courts. But even if Comcast's interpretation were accepted, Section 616 would still bar Comcast from *discriminatory* tiering, *i.e.*, putting the NFL Network on a narrowly distributed tier and continuing to carry its affiliated networks, Versus and the Golf Channel, on a broadly distributed tier.

The Media Bureau already resolved this argument against Comcast, holding that “[p]arties to a contract cannot insulate themselves from enforcement of the Act or our rules by agreeing to acts that violate the Act or rules.”¹³⁰ That holding, undoubtedly correct and consistent with determinations of federal courts,¹³¹ cannot properly be challenged here; it is not within the scope of the issues designated for hearing.¹³² Thus, Comcast may make this argument, if at all, only before the full Commission.

¹²⁹ Comcast Answer ¶ 18.

¹³⁰ *HDO* ¶ 72.

¹³¹ *Richardson v. Sugg*, 448 F.3d 1046 (8th Cir. 2006) (finding that employees cannot contract to waive their rights under Title VII prospectively, because to do so would violate public policy); *see also Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 77 (1982) (“There is no statutory code of federal contract law, but our cases leave no doubt that illegal promises will not be enforced in cases controlled by the federal law.”).

¹³² *HDO* ¶ 138; Nov. 20, 2008 Order ¶ 8; Nov. 21, 2008 Erratum ¶¶ 2-3.

At bottom, Comcast's reliance on the contract is too facile; it proves too much. If an unaffiliated programmer were barred from bringing a discrimination complaint against a dominant carrier whenever the discrimination was consistent with a facially non-discriminatory contract, cable operators could abuse programmers with impunity; the abuse would simply be reflected in the contracts. The public interest goals of Section 616 would be eviscerated if vertically integrated cable carriers could contract around them.

6. *Theoretical Factors Cited by Comcast's Experts*

Comcast's experts offer a laundry list of theoretical factors that they claim justify Comcast's discriminatory treatment of NFL Network compared to Versus and the Golf Channel. There is no evidence that Comcast ever relied on any of these *post hoc* factors (nor could there be, considering that many of the factors are immeasurable or, if measurable, are not meaningfully different for each network).

For example, Comcast expert Larry Gerbrandt relies heavily on an analysis of the relationship between a network's license fee and the ad revenue it earns.¹³³

¹³³ Orszag Report ¶ 17 & n.23; *id.* ¶ 22.

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Similarly, Mr. Gerbrandt has posited that the value of a network is influenced by whether or not the network covers a sport that is “participatory” in nature.¹³⁶ Based on this hypothesis, the expert claims that Comcast’s affiliate, the Golf Channel, is more desirable than the NFL Network because more viewers play golf than play football.¹³⁷

In any event, Comcast’s “participatory” theory defies common sense. Under Comcast’s expert’s analysis, a network focused entirely on “exercise walking” would be among the most desirable because 90 percent of Americans engage in that activity.¹³⁹ Even if this theory were correct, its application would mean that Comcast’s affiliated network, Versus, would be valueless because core sports on which it focuses — hockey, cage fighting, and bull riding — enjoy little or no participation among the viewing public.¹⁴⁰

7. *While Comcast’s Distribution Arm Would Actually Benefit from Broad Distribution of the NFL Network, Its Affiliated Networks Benefit Even More Substantially from Comcast’s Discriminatory Tiering.*

There can be little doubt that in its role as a distributor, broad distribution of the NFL Network, rather than sports tier carriage, makes the most economic sense for Comcast. As a distributor, Comcast earns money principally from two sources: advertising revenues and subscription fees.¹⁴¹ Comcast is entitled to sell advertisements during NFL Network commercial

¹³⁶ See, e.g., Gerbrandt Report ¶ 16.

¹³⁷ *Id.*

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¹³⁹ Gerbrandt Report Table 2.

¹⁴⁰ *Id.*

¹⁴¹ Singer Report ¶¶ 55-56;

breaks; it can sell an advertisement for more money if more viewers receive the NFL Network. Accordingly, increasing the NFL Network's distribution would allow Comcast to increase its profits as a distributor.

Comcast's distribution arm also would benefit from broad distribution of the NFL Network by increasing, or reducing its loss of, subscribers. Carrying the NFL Network on a premium tier encourages NFL Network fans to switch to one of several distributors that compete with Comcast and offer the Network at no additional cost.

Even if tiering the NFL Network did not serve Comcast's goals as a distributor, it did benefit Comcast's programming arm by helping Versus and Golf Channel gain market share, advertising revenues, and sports content at the NFL Network's expense. Tiering the NFL Network deprives Enterprises of economies of scale and of the most efficient distribution channel, therefore making it relatively cheaper, on a per-subscriber basis, to operate Versus and the Golf Channel than it is to operate the NFL Network.¹⁴² It also makes it easier for Versus and the Golf Channel to obtain viewers, advertisers, and programming vis-à-vis the NFL Network.¹⁴³

With reduced distribution and a diminished ability to compete, the NFL Network is a less attractive outlet for desirable programming, including the eight-game package. Discriminating against the NFL Network therefore has rendered Versus a more attractive competitor for the eight-game package in the future. Ultimately, Comcast's tiering of the NFL Network helped Comcast Corporation as a whole because it made it more difficult for the NFL Network to compete against Comcast's affiliates Versus and the Golf Channel.

¹⁴² Singer Report ¶ 3.

¹⁴³ *Id.* ¶¶ 33-36.

II. COMCAST REQUIRED A FINANCIAL INTEREST IN PROGRAMMING IN VIOLATION OF 47 C.F.R. § 76.1301(a).

Comcast threatened to move the NFL Network to a premium tier if the NFL did not license the eight-game package to Comcast for its affiliated network, Versus. When the NFL awarded the package to the NFL Network, and not to Versus, Comcast followed through on its threat. Comcast's actions constitute a clear violation of 47 C.F.R. § 76.1301(a).

The facts are undisputed.¹⁴⁴ Comcast's demands were precisely the sort of "ultimatums" and "intimidation" that enactment of Section 616 sought to prevent.¹⁴⁵ By demanding that the eight-game package — NFL Network's most valuable asset, which Comcast valued at \$1.5 billion — be carried on Versus rather than the NFL Network, and by tiering the NFL Network after Versus did not receive the eight-game package, Comcast demonstrated that it had required a financial interest in the package as a condition of carriage in violation of Section 616.

Comcast argues that "financial interest," as used in Section 616, must mean "equity interest." But, like its argument that the parties' contract somehow excuses its conduct, Comcast's attempt to narrow Section 616 already has been rejected by the Media Bureau and is therefore outside the scope of this hearing.¹⁴⁶

¹⁴⁴ See, e.g., Burke Decl. ¶ 14 (admitting that Mr. Burke, Mr. Roberts, and Mr. Cohen "repeatedly pointed out in meetings and telephone conversations with representatives of the NFL that, if the NFL elected to add the games to NFLN rather than license the rights to OLN, the 2004 Agreements would permit Comcast to choose the tier on which Comcast would offer NFLN to its customers.");

¹⁴⁵ Second Report & Order at 2649 (Enterprises Exh. 181).

¹⁴⁶ HDO ¶¶ 89, 138.

Comcast's narrow interpretation is in any case at odds with the plain language and purpose of the statute and implementing regulations. Congress could have used the limiting term "equity interest" in Section 616, but it chose the broader term "financial interest" in order to prohibit tactics that have the effect of giving MVPDs a financial stake in the success of a programming service, even if the MVPDs are creative enough to avoid structuring the interest as "equity." Indeed, Congress used the term "equity interest" elsewhere in the Communications Act when it intended to do so.¹⁴⁷

Congress's use of the term "financial interest" is suited precisely for cases such as this. The license to distribute the extremely valuable eight-game package on Versus would have included the right to earn and control the significant monetary benefits of that programming just as if Versus owned the programming itself. Requiring the NFL Network to relinquish the package and its accompanying benefits would have eliminated the NFL Network's premier programming. Comcast's suggestion that Section 616 was written to cover an MVPD's acquisition of one share of a programmer's stock but not to cover its investment in a programmer's asset strains Congress's intent beyond the breaking point.

¹⁴⁷ The Communications Act is clear that "equity interest" is not synonymous with a "financial" interest. *See, e.g.*, 47 U.S.C. § 275(a)(2) (prohibiting certain Bell operating companies from "acquir[ing] any equity interest in, or obtain[ing] financial control of, any unaffiliated alarm monitoring service entity after" a specified date); *see also* 47 U.S.C. § 153(1) (defining an "affiliate" as including an entity that "own[s] an *equity interest* (or the equivalent thereof) of more than 10 percent") (emphasis added); 47 U.S.C. § 273(d)(8)(A) (for the purpose of telephone equipment manufacturing restrictions on Bell affiliates, defining affiliation with reference to the percentage of "voting equity interest" an entity holds in Bell Communications Research, Inc.).

III. THE COMMISSION SHOULD ORDER COMCAST TO CARRY THE NFL NETWORK ON NON-DISCRIMINATORY TERMS.

Under the program carriage rules, the Commission can order “mandatory carriage of a video programming vendor’s programming on [a] defendant’s video distribution system [and can] establish[] prices, terms, and conditions for the carriage of a video programming vendor’s programming.”¹⁴⁸ Comcast violated the program carriage rules by moving the NFL Network from a basic programming tier to a premium tier viewed by a small fraction of Comcast’s total subscribers, while keeping its own national sports channels on its systems’ basic tier. Comcast did this both to advantage its affiliated networks, Versus and the Golf Channel, and to punish the NFL for failing to give Comcast a financial interest in programming.

To remedy these violations, the Commission should order Comcast to carry the NFL Network on the most broadly-penetrated programming tier on which it carries Versus or the Golf Channel on each of its systems. The Commission should order Comcast to pay a monthly per-subscriber license fee that reflects the fair market value of the NFL Network. These prices are set forth in the direct testimony of Dr. Hal Singer. This carriage obligation should continue, at Enterprises’ option, from the date on which Comcast complies with the Commission’s order on all of its systems until the end of a period equal to the entire term of the Comcast/Enterprises agreement, *i.e.*, four years, eight months, and 19 days.

With respect to carriage after the expiration of the above-described period (or earlier, at Enterprises’ option), Comcast should be ordered to negotiate in good faith with

¹⁴⁸ 47 C.F.R. § 76.1302(g)(1); *see also id.* § 76.1302(g)(2) (providing for possibility of additional sanctions); Nov. 21, 2008 Erratum ¶¶ 2-3 (stating that inquiry is “whether mandatory carriage of the complainant’s programming on the defendant’s system is necessary to remedy the violation(s) and, if so, the prices, terms, and conditions for such carriage, and such other remedies as the Administrative Law Judge recommends”).


Enterprises for a new agreement by which Comcast would carry the NFL Network on all of its systems on nondiscriminatory terms and conditions, including terms providing for carriage on a tier with no lower penetration than the tier on which Comcast carries Versus or the Golf Channel.

CONCLUSION

For the reasons set forth above, judgment should be entered in favor of Enterprises and the requested relief granted.

Respectfully submitted,

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April 6, 2009

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NFL Enterprises LLC v. Comcast Cable Communications, LLC

Index of Hearing Exhibits of NFL Enterprises LLC

Exhibit Number	Descriptive Title	Number of Pages	Sponsoring Witness(es)
NFL Network Affiliation Agreements and Amendments			
1	[REDACTED]	1	[REDACTED]
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